



राजपत्र, हिमाचल प्रदेश (असाधारण)

हिमाचल प्रदेश राज्य शासन द्वारा प्रकाशित

शिमला, शुक्रवार, 28 जनवरी, 2000/8 माघ, 1921

हिमाचल प्रदेश सरकार

निर्वाचन विभाग

अधिसूचना

शिमला-171009, 14 जनवरी, 2000

संख्या 3-10/99-ई०एल०एन०.—भारत निर्वाचन आयोग की अधिसूचना संख्या 82/हि० प्र०-वि० स०/8/98, दिनांक 5 जनवरी, 2000, तदनुसार 15 पौष, 1921 (शक), जिसमें निर्वाचन अर्जी संख्या 8 में शिमला स्थित हिमाचल प्रदेश उच्च न्यायालय के तारीख 16 दिसम्बर, 1999 का निर्णय निहित है, को अंग्रेजी रूपान्तर सहित, जनसाधारण की सूचना हेतु प्रकाशित किया जाता है।

आदेश से,

भीम सेन,
मुख्य निर्वाचन अधिकारी,
हिमाचल प्रदेश।

मूल्य : 1 रुपया।

भारत निर्वाचन आयोग

निर्वाचन सदन,
अशोक रोड,
नई दिल्ली-110001.

5 जनवरी, 2000

तारीख—
15 पौष, 1921 (शक)

अधिसूचना

सं० 82/हि०प्र०-वि०स०/8/98.—लोक प्रतिनिधित्व अभिनियम, 1951 (1951 का 43) की धारा 106 के अनुसरण में, निर्वाचन आयोग 1998 की निर्वाचन अर्जी सं० 8 में शिमला स्थित हिमाचल प्रदेश उच्च न्यायालय के तारीख 16 दिसम्बर, 1999 के निर्णय को एतद्द्वारा प्रकाशित करता है।

आदेश से,

हस्ताक्षरित/-
(के० आर० प्रसाद)
सचिव,
भारत निर्वाचन आयोग।

ELECTION COMMISSION OF INDIA

Nirvachan Sadan,
Ashoka Road,
New Delhi-110 001.

Dated 5th January, 2000
15 Pausa, 1921 (Soka)

NOTIFICATION

No. 82/HP-LA/8/98.—In pursuance of Section 106 of the Representation of the People Act, 1951 (43 of 1951), the Election Commission hereby publishes Judgment dated 16th December, 1999 of the High Court of Himachal Pradesh at Shimla in Election Petition No. 8 of 1998.

By order,

Sd/-
(K. R. PRASAD)
Secretary,
Election Commissioner of India.

Copy of Judgment delivered on 16-12-99 by the Hon'ble Mr. Justice R. L. Khurana, J. in Election Petition No. 2/98 titled:—

ELECTION PETITION NO. 8/1998

1. Shri Yogesh Sethi son of Shri R. L. Sethi, resident of Chirag, Tank Road, Solan, District Solan, Himachal Pradesh.

2. Shri Dharam Chand Guleria son of Late Shri Hira Lal Guleria, resident of Guleria Niwas, Hospital Road, Solan, Himachal Pradesh

.. *Petitioners.*

Versus

1. Ms. Krishna Mohini daughter of Shri Krishan Chand, resident of H. No. 86/2, Ward No. 7, Solan, District Solan, Himachal Pradesh.

2. Shri Mohinder Nath Sofat son of Shri Ram Kishan Sofat, resident of H. No. 38/2, Ward No. 5 near General Post Office, Solan, District Solan, Himachal Pradesh.

3. Shri Jagdish Chander Bhardwaj son of Shri Niranjana Ram, resident of Power House Road, Saptoon, District Solan, Himachal Pradesh.

4. Shri Ravinder Nath Parihar son of late Shri Gauri Shankar, resident of Village Bashil, P. O. Mamligh, Tehsil Kandaghat, District Solan, Himachal Pradesh.

5. Shri Vinod Kumar son of Shri Barfu Ram, resident of Village Sumti, P. O. Saptoon, Tehsil and District Solan, Himachal Pradesh.

6. Smt. Satya Devi daughter of Shri Sohan Singh, Lucky Fun Food, Mareog, P. O. Gaura, District Solan, Himachal Pradesh.

7. Shri Haminder Singh Thakur son of Shri Chattar Singh, resident of H. No. 53/1, Sri-Nagar, Kandaghat, P. O. and Tehsil Kandaghat, District Solan, Himachal Pradesh

.. *Respondents.*

Copy of Judgment in the High Court of Himachal Pradesh at Shimla-171 001.

IN THE HIGH COURT OF HIMACHAL PRADESH. SHIMLA

ELECTION PETITION No. 8 OF 1998

DATE OF DECISION : DECEMBER 16, 1999

Yogesh Sethi and another

.. *Petitioner.*

Versus

Ms. Krishna Mohini and others

.. *Respondents.*

Coram :

The Hon'ble Mr. Justice R. L. Khurana, J.
Whether approved for reporting ? Yes

For the Petitioners : Mr. Bhoop Singh with Mr. B. K. Sood, Advocate.

For the Respondents : Mr. M. M. Vaid, for respondent No. 1.
None for respondents No. 2 to 7.

Whether reporters of Local Papers may be allowed to see the Judgment ? Yes.

R. L. KHURANA, J.

Respondents No. 1 to 7 were the candidates in the election to the 9th Himachal Pradesh Legislative Assembly from 14—Solan Assembly Constituency. In the elections held on 28-2-1998, respondent No. 1, Ms. Krishna Mohini, who was a Congress candidate, was declared elected. Respondent No. 2, Shri Mohinder Nath Sofat, a candidate of the Bhartiya Janata Party, lost by a margin of 26 votes.

The election of respondent No. 1 has been challenged by the two petitioners, who are the voters of 14—Solan Assembly Constituency and the Counting Agent and Election Agent respectively of the respondent No. 2, by virtue of the present Election Petition under section 100 (1) (d) (iii) of the Representation of the People Act, 1951 (for short the Act), claiming the following two reliefs:—

- (a) the election of respondent No. 1 from 14—Solan Assembly Constituency be declared void and set aside ; and
- (b) the respondent No. 2 be declared to have been duly elected from the said constituency under section 101 (a) of the Act.

According to the petitioner, during the course of second recount 45 valid votes polled in favour of respondent No. 2, despite protests, were wrongly and illegally rejected by the Returning Officer. The details of such 45 votes have been fully set out in paragraphs 8 and 9 of the petition. Further case of the petitioner is that apart from the improper rejection of 45 valid votes polled in favour of the respondent No. 2, 27 invalid votes were improperly and wrongly received and counted in favour of respondent No. 1. Such 27 invalid votes, the details of which have been given in paragraph 10 of the petition, were liable to be rejected under Rule 56B of the Conduct of Election Rules, 1961.

The petition is being resisted only by respondent No. 1. She pleaded that no irregularities were committed during the counting of votes by the counting staff and/or the Returning Officer. 45 votes polled in favour of respondent No. 2, which were invalid, were rightly rejected and 27 votes polled in favour of respondent No. 1, which were valid, were rightly accepted and counted in her favour.

On the pleadings of the parties, following issues were framed on 8-7-1998 :—

1. Whether the copy of the petition supplied to the respondent is not a true copy of the petition ? If so, to what effect ? OPR.
2. Whether the petition has not been properly verified as required under Section 83 (c) of the Representation of People Act ? If so, to what effect ? OPR.
3. Whether the petition lacks material particulars and facts and is vague as alleged ? If so, to what effect ? OPR.
4. Whether the petition is bad for want of non-joinder of necessary parties ? If so, to what effect ? OPR.
5. Whether the petitioner is entitled to recount of votes for the reasons stated in the election petition ? OPP.
6. Whether 45 valid votes of respondent No. 2 were wrongly rejected and 27 invalid votes of respondent No. 1 were wrongly accepted as alleged ? If so, to what effect ? OPP.
7. Whether irregularities and illegalities were committed during counting as mentioned in the petition ? If so, to what effect ? OPP.
8. Relief.

Issues No. 1 to 4, which were treated as preliminary issues, were decided against respondent No. 1 on 14-10-1998. The Special Leave Petition, being No. 19687/98 preferred by respondent No. 1 against the order dated 14-10-1998 disposing of the preliminary issues against her, was dismissed by the Supreme Court on 18-12-1998.

It may be stated that the election of respondent No. 1 was also assailed by respondent No. 2, the defeated candidate, under section 100 (1) (c) and 100 (1) (d) (i) of the Act on the grounds of improper rejection of nomination papers of two candidates and improper acceptance of the nomination paper of respondent No. 3. Shri Jagdish Chander Bhardwaj. The election petition filed by respondent No. 2, being El. P. No. 3 of 1998 was allowed by this court on 12-5-1999 and the election of respondent No. 1 from 14—Solan Assembly Constituency was declared void and the same was set aside on both the grounds under section 100 (1) (c) and 100 (1) (d) (i) of the Act.

Respondent No. 1 went up in appeal before the Supreme Court against the order dated 12-5-1999 passed in El. P. No. 3 of 1998, setting aside her election from 14—Solan Assembly Constituency. The Supreme Court on 26-10-1999 upheld the findings of this court setting aside the election of respondent No. 1 under section 100 (1) (c) of the Act on the ground of improper rejection of nomination papers of two candidates, namely, Pritam Chand and Mohan Singh (See : *Ms. Krishna Mohini v. Mohinder Nath Sofar*, JT 1999 (8) S. C. 379J).

After the decision of this court dated 12-5-1999, in El. P. No. 3 of 1998 and before the above mentioned decision of the Supreme Court, an application being E M P No. 16 of 1999 was made by respondent No. 1 under Order 6 Rule 17, read with section 151, Code of Civil Procedure, for the amendment of her written statement. The following was sought to be added as paragraph 13A in the written statement by way of amendment:—

“The election petition of the petitioner has become redundant and infructuous on account of subsequent developments and reasons in this matter that the election of the returned candidate has been declared void *vide* the judgment dated 12-5-99 after Hon'ble Court in Election Petition No. 3 of 1998 under section 100 (1) (c) and 100 (1) (d) (i) of the R. P. Act in consequence thereof the whole election *qua* all the candidates has become void *ab initio* and *non est* and the present petition E. P. No. 8 of 1998 cannot continue till the order and judgment dated 12-5-1999 in E. P. No. 3 of 1998 stand and holds the field.”

The amendment as prayed for by the respondent No. 1 was allowed by this court on 13-9-1999 and consequently the following additional issue came to be framed as issue No. 7A:—

“Whether the present Election Petition does not survive after the decision of Election Petition No. 3/98 whereby the election of respondent No. 1 was set aside ? If so, to what effect ? OPR.

By virtue of the present order, I propose to dispose of the abovesaid additional issue.

I have heard the learned counsel for the parties and have also gone through the record of the case as well as the written submissions furnished by the parties. My findings on the above additional issue are as under :—

Issue No. 7A :

The case put forth by the respondent No. 1 is that in view of her election having been declared void and set aside in Election Petition No. 3 of 1998 under section 100 (1) (c) of the Act, the present election petition would not survive. Improper rejection of nominations of Sarvshri

Pritam Chand and Mohan Singh by the Returning Officer has vitiated the whole election process right from the stage of the scrutiny of nomination papers. Anything done thereafter would be null and void, and illegal. Further case of the respondent No. 1 is that once the election of respondent No. 1 has been declared void and set aside, this court in the present petition while deciding issues No. 6 and 7 against the petitioner would not be in a position to declare the respondent No. 1 as having been duly elected. Consequently upon the election of respondent No. 1 having been declared void and set aside, the seat has become vacant on and with effect from 12-5-1999, that is, the date of decision of this court in Election Petition No. 3 of 1998 under section 107 of the Act and as such the present petition cannot proceed.

Per contra, it has been contended by the learned counsel for the petitioners that the decisions in Election Petition No. 3 of 1998, declaring the election of respondent No. 1 as void, has no effect whatsoever on the survival and continuance of the present petition. The two election petitions, that is, Election Petition No. 3 of 1998 and the present one are distinct, separate and independent of each other having been filed on separate and distinct grounds. No declaration under section 101 (a) was sought in Election Petition No. 3 of 1998. The said petition was simpliciter for declaring the election of respondent No. 1 as void under section 100 (1) (c) of the Act. The present petition is a composite petition seeking the declaration that the election of respondent No. 1 is void under section 101 (1) (d) (iii) of the Act, and a further declaration under section 101 (a) of the Act for declaring respondent No. 2 as having been duly elected for having secured majority of votes. It has further been contended that independent findings are required to be recorded on the issues No. 5 to 7 framed in the present case. Until and unless these findings are recorded in the present case, the election of respondent No. 1 cannot be held to be void and no further enquiry as contemplated under section 101 of the Act would be made. The enquiry under section 101 of the Act could be made only if a finding is recorded by this court that the result of election insofar as it concerns respondent No. 1, the returned candidate, has been materially effected by improper rejection of valid votes polled in favour of respondent No. 2 and/or improper reception of invalid votes polled in favour of respondent No. 1. It has also been contended that in the absence of a Recrimination petition under section 97 of the Act, respondent No. 1 is precluded from attacking the election of respondent No. 2 in the event he is declared elected under section 101 (a) of the Act. The election of a returned candidate can be challenged only either by way of an election petition under section 100 of the Act or by way of a Recrimination Petition under section 97 of the Act in case there is a prayer for the relief under section 101 of the Act. The ground of improper rejection of nomination papers of Sarvshri Pritam Chand and Mohan Singh were available to respondent No. 1 and/or other respondents 3 to 7 for assailing the election of respondent No. 2, in the event he is declared as elected under section 101 of the Act and such ground could have been taken by filing the requisite Recrimination Petition under section 97 of the Act. Having failed to file a Recrimination Petition, respondent No. 1 is precluded from assailing the election of respondent No. 2 either on the ground that the whole election was void due to improper rejection of nomination papers of any candidate or on any other ground. In support of his contention, the learned counsel for the petitioners placed reliance on the ratio laid down by the Supreme Court in *Jabar Singh v. Genda Lal* (A. I. R. 1964 S. C. 1200), as under:—

“There are, however, cases in which the election petition makes a double claim, it claims that the election of the returned candidate is void, and also asks for a declaration that the petitioner himself or some other person has been duly elected. It is in regard to such a composite case that S. 100 as well as S. 101 would apply, and it is in respect of the additional claim for a declaration that some other candidate has been duly elected that S. 97 comes into play. Section 97 (1) thus allows the returned candidate to recriminate and raise pleas in support of his case that the other person in whose favour a declaration is claimed by the petition cannot be said to be validly elected, and these would be pleas of attack and it would be open to the returned candidate to take these pleas, because when he recriminates, he really becomes a counter petitioner challenging the validity of the election of the alternative candidate. The result of S. 97 (1) therefore,

is that in dealing with a composite election petition, the Tribunal enquires into not only the case made out by the petitioner, but also the counter claim made by the returned candidate. That being the nature of the proceedings contemplated by S. 97 (1), it is not surprising that the returned candidate is required to make his recrimination and serve notice in that behalf in the manner and within the time specified by S. 97 (1) proviso S. 97 (2). If the returned candidate does not recriminate as required by S. 97, then he cannot make any attack against the alternative claim made by the petition. In such a case an enquiry would be held under S. 100 so far as the validity of the returned candidates election is concerned, and if as a result of the said enquiry declaration is made that the election of the returned candidate is void, then the Tribunal will proceed to deal with the alternative claim, but in doing so, the returned candidate will not be allowed to lead any evidence because he is precluded from raising any pleas against the validity of the claim of the alternative candidate."

Section 101 of the Act insofar as it is relevant and material for the purpose of the present case, reads:—

"If any person who has lodged a petition has in addition to calling in question the election of the returned candidate, claimed a declaration that he himself or any other candidate has been duly elected and the High Court is of the opinion:—

(a) that in fact the petitioner or such other candidate received a majority of valid votes ;
or

(b)
.....
.....

the High Court shall after declaring the election of the returned candidate to be void declare the petitioner or such other candidate, as the case may be, to have been duly elected."

There is no denying that a claim under section 101 (a) of the Act could not have been put forth by an election petition when the election of the returned candidate has been challenged on the ground of improper rejection of any nomination under section 100 (1) (c) of the Act. Therefore, respondent No. 2, who was the election petitioner in Election Petition No. 3 of 1998 and had challenged the election of respondent No. 1 under section 100 (1) (c) of the Act, had rightly not put forward the claim contemplated under section 101 (a) of the Act.

Admittedly, the election of respondent No. 1 stands declared void and set aside under section 100 (1) (c) of the Act in Election Petition No. 3 of 1998 by this court on 12-5-1999 and affirmed in appeal by the Supreme Court on 26-10-1999.

Section 107 (1) of the Act, which deals with the effect of the orders of the High Court, provides:—

"Subject to the provisions contained in Chapter IV-A relating to the stay of operation of an order of the High Court under section 98 or section 99, every such order shall take effect as soon as it is pronounced by the High Court."

(Emphasis supplied).

The order passed by this court on 12-5-1999 in Election Petition No. 3 of 1998 declaring the election of respondent No. 1 to be void falls under section 98 (b) of the Act. Such order by virtue of section 107 of the Act has come into effect as soon as it was pronounced by this court, that is, on 12-5-1999. Therefore, once the election of respondent No. 1 has already been declared

void and set aside, the same cannot be declared void for the second time on the same or another ground. The effect of declaration of election of respondent No. 1 as void, is that the seat to the Legislative Assembly from 14—Solan Assembly Constituency has become vacant on and with effect from 12-5-1999.

In the present case, as stated above, two composite claims have been made, that is, the election of the respondent No. 1 is void and that the respondent No. 2 be declared duly elected. The second claim is based on the first claim. The petitioners can succeed in the second claim only if they are able to show that:—

- (a) the result of election insofar as it concern respondent No. 1 has been materially affected ; and
- (b) there has been an improper reception of votes in favour of respondent No. 1 and/or there has been an improper refusal or rejection of any vote polled in favour of respondent No. 2.

There is no denying that if the first claim, made under section 100 (1) (d) (iii) of the Act for declaring the election of respondent No. 1 as void, fails on any account, the second claim made under section 101 (a) of the Act would also fail.

The first claim made under section 100 (1) (d) (iii) of the Act now cannot be granted since the election of the respondent No. 1 stands declared void and set aside on 12-5-1999. Therefore, the second claim made under section 101 (a) of the Act, would also fail and cannot be granted.

In *Cliford v. Stanley D. D. Nichols Roy and another* (A. I. R. 1963 Assam 154), only two candidates had contested the election from Cherrapunji Assembly Constituency, a seat reserved for Scheduled Tribes. The election of the returned candidate, that is, respondent No. 1 in the said case, was challenged by a voter of the Constituency on the following three grounds:—

- (i) the elected candidate was not a member of Scheduled Tribe ;
- (ii) he was not an elector in any of the four reserved seats for the Scheduled Tribes ; and
- (iii) even if he was a member of the Scheduled Tribes, he certainly was not a member of the Scheduled Tribes of the Autonomous Khasi and Jaintia Hills District.

A further prayer was made for declaring respondent No.2 therein, the defeated candidate, as having been duly elected. The Election Tribunal held against the election petitioner on all the three grounds and consequently dismissed the petition. During the pendency of the appeal before the Division Bench of the Assam High Court, the elected candidate resigned his seat and as a result the seat was declared vacant. A question arose whether, in view of the situation that had arisen, the relief under section 101 (a) of the Act could be granted by declaring the other candidates as elected.

Following the decision of the Supreme Court in *Keshav Lakshman Borkar v. Dr. Deorao Lakshman Anande* (A I R 1960 S C 131), the Division Bench held:—

“Normally, where two candidates filed nomination papers and one of the nomination papers were to be rejected on grounds of disqualification, the natural consequence that would follow is a declaration that the other candidate, whose nomination paper has been accepted, is duly elected in the absence of any other valid nomination paper. But whatever may be the position, if such a contingency arises the decision of the Supreme Court seems to leave the matter in no doubt that the only consequence in a situation of the kind that is alleged to have arisen in this case the only proper order to make if at all, is for the election Tribunal to order a fresh election, and that to declare

the candidate, who had been defeated in the election, duly elected would be wrong.....”

In the present case as well with the declaration of the election of respondent No. 1 as void *vide* judgment dated 12-5-1999 in Election Petition No. 3 of 1998, the seat has fallen vacant on and with effect from that date and as such the only course open is to hold and conduct fresh elections. To declare respondent No. 2 who was defeated in the election, as elected would be wrong. Besides, the improper rejection of nominations of Sarvshri Pritam Chand and Mohan Singh by the Returning Officer has vitiated the whole election process right from the stage of the scrutiny of the nomination papers.

Under the circumstances, the present election petition does not survive after the decision in Election Petition No. 3 of 1998, whereby the election of respondent No. 1 was set aside under section 100 (1) (c) of the Act. The effect is that the present petition has been rendered infructuous. The issue is decided in favour of respondent No. 1.

Relief :

As a result, the present election petition is dismissed, leaving the parties to bear their own costs.

It is further directed that the substance of the decision be communicated to the Registrar General of the Election Commission of India, New Delhi and the Speaker of the Himachal Pradesh Legislative Assembly forthwith. An authenticated copy of the judgment be also sent to the Election Commission of India, New Delhi, as required under section 103 of the Act.

December 16, 1999.

Sd/-,
(R. L. KHURANA),
Judge.

